

O5LJCHEC

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

CHEMIMAGE CORPORATION,

Plaintiff,

v.

24 Civ. 2646 (JMF)

JOHNSON & JOHNSON, *et al.*,

Conference

Defendants.

-----x

New York, N.Y.

May 21, 2024

10:15 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

QUINN EMANUEL URQUHART & SULLIVAN LLP

Attorneys for Plaintiff

BY: COURTNEY C. WHANG

ANDREW J. ROSSMAN

PATTERSON, BELKNAP, WEBB & TYLER LLP

Attorneys for Defendants

BY: RACHEL B. SHERMAN

CHRISTOPHER WILDS

EMMA ELLMAN-GOLAN

Also Present:

Colett Juran, Summer Associate

O5LJCHEC

(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record.

MS. WHANG: Good morning, your Honor.

Courtney Whang from Quinn Emmanuel for plaintiff ChemImage Corporation. Also with me is Andrew Rossman, principal trial counsel, in accordance with your Honor's rules, and a summer associate at Quinn Emmanuel, Collet Juran.

MS. SHERMAN: Good morning, your Honor.

Rachel Sherman from Patterson Belknap on behalf of the defendants. Here with me is my colleague, Chris Wilds and Emma Ellman-Golan from Johnson & Johnson.

THE COURT: All right. Good morning to you as well.

So we're here for an initial pretrial conference which I restored in the calendar after request to do so, given the parties' agreement about the speed of this litigation. I know it seems like there might be disagreement about whether and to what extent I should endeavor to set a schedule that's consistent with that, something I definitely want to hear from you about.

I will say in 12 years on the bench I've never encountered a provision like this, and it strikes me as unusual and to some extent problematic to the extent that it purports to or tries to bind a Court to adjudicate something on the parties' schedule, which is to say I don't know why by contract

O5LJCHEC

1 parties should be entitled to sort of jump the queue, so to  
2 speak, and get a Court to adjudicate something more quickly  
3 than it would normally do. That being said, I may be able to  
4 do it even with the normal queue, so it may be a moot point.

5 I did notice in the Exhibit C, or attachment C --  
6 appendix C to the agreement, which includes the eight-month  
7 timeframe that plaintiff is relying on here, there seems to be  
8 an internal inconsistency because the next paragraph says that  
9 both sides agree to conduct discovery in a manner and on a  
10 schedule designed to complete of discovery -- so that's a typo  
11 of some sort -- within nine months after office of the first  
12 complaint.

13 And I'm not sure how to square that with the paragraph  
14 before, which is an agreement to put it on a schedule that will  
15 assure, quote/unquote, trial-ready status eight months after  
16 service of the first complaint. One would think a discovery  
17 period that exceeds the period in which something is to be made  
18 trial ready doesn't make a whole lot of sense, so not sure how  
19 to square those. But in any case, wanted to bring you in and  
20 talk about how to proceed in this matter and go from there.

21 I think it might be helpful to start with whether  
22 plaintiff intends to file an amended complaint. I think, if  
23 I'm not mistaken, the deadline to do that is this week on  
24 Friday, if I'm not mistaken. So Ms. Whang, do you want to fill  
25 us in on your plans on that score?

O5LJCHEC

1 MS. WHANG: Yes, your Honor.

2 So plaintiff is considering filing an amended  
3 complaint. However, I will say that the provision expressly  
4 contemplates this. You'll see -- and I have copies if it's  
5 helpful for the Court -- of the expedited litigation provision.  
6 Do you need a copy?

7 THE COURT: No.

8 MS. WHANG: Okay. So --

9 THE COURT: Assuming you're talking about appendix C.

10 MS. WHANG: Appendix C, exactly.

11 So on the second page of appendix C, it's expressly  
12 contemplated that the eight-month trial-ready provision is  
13 pegged off of the first complaint. It says that language very  
14 specifically. So plaintiffs are considering amending their  
15 complaint. But again, the eight-month trial-ready provision  
16 contemplates that.

17 I do want to address your Honor's questions about how  
18 do we square this, and I think the first place to start is the  
19 text of the eight-month trial-ready provision. But before  
20 doing that, a little bit about the background. This provision,  
21 I understand, was proposed by defendants themselves. This  
22 wasn't a proposal by the plaintiff here. It was proposed by  
23 defendants. And the parties agreed to this, and then they  
24 inked this agreement that has this very specification language.  
25 The language says that the case should be trial ready within

O5LJCHEC

1 eight months and not presuming to bind the Court to make any  
2 decisions within that time, but just that the parties would  
3 ensure that the case would be trial ready within that  
4 eight-month period.

5           So the eight-month trial-ready provision, while very  
6 unique, is also doable in this case. Because if you look  
7 further in this agreement, further in this expedited litigation  
8 provision, it provides for streamlined discovery. And this  
9 streamlined discovery is quite unique as well, right. It's  
10 only 40 hours of deposition per side, that's inclusive of the  
11 fact, and expert discovery that's very streamlined. And it  
12 also says that the discovery requests for electronically stored  
13 information will have the streamlined request process. When  
14 you combine those things, this expedited litigation provision  
15 is not only unique, but shows that the eight-month trial-ready  
16 provision is absolutely achievable.

17           Now, your Honor asked how do you square the  
18 discrepancy or the seeming discrepancy with the nine-month  
19 discovery. It says nine months after service of the first  
20 complaint for discovery, and I think the answer there is  
21 twofold. Number one, you know, back to black letter basics of  
22 contract interpretation, we go to what is the intent of the  
23 parties. Here, you if you look at the heading of this  
24 provision, it's called "expedited litigation." You can tell  
25 that the intent of the parties is to move quickly and be trial

O5LJCHEC

1 ready within eight months.

2           Number two, we go back to black letter contract  
3 interpretation principles. And hard book law says that you  
4 can't read one provision to the exclusion of the other, right,  
5 you should try and harmonize these two provisions. And in  
6 order to do that, you read the exact words within the  
7 nine-month provision, it says that you should enter a schedule  
8 designed to complete discovery – if you take out the rogue "of"  
9 – within nine months after service of the first complaint. We  
10 can complete discovery within nine months. It will be less  
11 than nine months, and that's the only way to read that  
12 consistent with the eight-month trial-ready provision.

13           THE COURT: Okay. And with respect to your potential  
14 forthcoming amendment, since it's only three days away, one  
15 imagines that you have some sense of what the amendment would  
16 entail. Can you preview that and whether and to what extent it  
17 goes beyond addressing the arguments in defendant's motion?

18           MS. WHANG: So the scope of the amendment would be  
19 very minor. Here, it's notable that defendants have only made  
20 a partial motion to dismiss. So the contemplated amendment  
21 would not change the scope of the claims -- for example, would  
22 not change the scope of the facts that are contemplated by the  
23 current claims.

24           It wouldn't change discovery in the same way the  
25 partial motion to dismiss here, which is not a reason why the

O5LJCHEC

1 eight-month trial-ready provision could not be -- a schedule  
2 could not be entered consistent with the eight-month  
3 trial-ready provision because that contemplated -- or the filed  
4 motion to dismiss, rather, is only a partial motion to dismiss.  
5 The claims that the defendants have not moved on will still  
6 inform discovery in the exact same scope and manner as if  
7 defendants had not filed that motion and if plaintiffs were not  
8 filing an amended complaint.

9 THE COURT: Okay. And can you answer my question,  
10 which is what is the nature of the amendments? Not just  
11 they're minor, what are you actually changing?

12 MS. WHANG: So one of the amendments that we are  
13 contemplating is making more clear that the breach of contract  
14 claim will have a specific request for relief in the  
15 \$40 million termination fee. One of plaintiff's arguments in  
16 their motion to dismiss is that the damages that go beyond the  
17 \$40 million termination fee should be stricken or removed from  
18 the complaint. So plaintiffs are contemplating amending to  
19 make clear that based on the existing allegations, that the  
20 \$40 million termination fee is also included in their prayer  
21 for relief, so an example of a very minor amendment.

22 THE COURT: Okay. And anything beyond that?

23 MS. WHANG: There may be additional facts to support  
24 existing causes of action, no additional causes of action.

25 THE COURT: Okay. Let me hear from defense counsel.

O5LJCHEC

1 Ms. Sherman?

2 MS. SHERMAN: Thank you, your Honor.

3 So at the outset, I don't think we've gotten a clear  
4 answer on whether or not ChemImage is going to amend its  
5 complaint on Friday, which really brings home the point we  
6 don't yet know exactly which claims and which defendants are  
7 going to be in the case. And we're generally willing to abide  
8 by an eight-month schedule. But I think in order for that to  
9 be realistic, we need to have an understanding of which claims  
10 are going to survive the motion to dismiss. And I would  
11 actually agree with plaintiff that the contract itself  
12 contemplates a fairly expedited dispute resolution process, but  
13 that is in conjunction with the other clear limitations within  
14 the contract, including a \$40 million limitation in the event  
15 of a termination.

16 So all of that has to be read together. And instead,  
17 what plaintiff has pleaded thus far is a complaint that goes  
18 far beyond the damages contemplated by the contract that brings  
19 in parties, J&J that is not a party to the contract, that adds  
20 tort claims against J&J. And on top of that, they then served  
21 extremely broad document discovery including things like asking  
22 for all documents related to Johnson & Johnson's entire  
23 robotics program, strategic plans, funding, other acquisitions  
24 that were considered and chosen not to enter into.

25 So they have made clear that they intend to litigate a

O5LJCHEC

1 very broad case, and that is not feasible to do within the time  
2 period that they have proposed. So in addition to needing  
3 clarity, I think there's going to be some necessary  
4 negotiations and compromises on the scope of the discovery  
5 that's being sought.

6 Both sides agree there will need to be expert  
7 discovery. But I would point out, your Honor, that if our  
8 motion to dismiss is granted and these extra contractual lost  
9 profits claims are dismissed, then there will not need to be  
10 extensive damages discovery. We will not need damages experts.  
11 The case will become narrower.

12 Similarly, I disagree with Ms. Whang that the motion  
13 to dismiss has no potential impact on the scope of discovery.  
14 Because in addition to the damages issue, Johnson & Johnson may  
15 not be in the case following resolution of that motion, and  
16 certainly that would limit the scope of discovery of potential  
17 custodians, all of the ESI that is sought from Johnson &  
18 Johnson.

19 And we are not taking the position that there might  
20 not be any relevant discovery from Johnson & Johnson. But  
21 certainly it would be a much narrower request if the tortious  
22 interference claim is thrown out and the contract claim against  
23 Johnson & Johnson. So I think our position is that we should  
24 have clarity on what the amendment actually looks like, have a  
25 ruling on the motion to dismiss. And we will continue to work

O5LJCHEC

1 with plaintiff in the meantime to try to work out the discovery  
2 disputes that we know we're going to have about the claims that  
3 we know will be in the case. So we're willing to continue to  
4 move toward while that motion is pending. But I think for  
5 purposes of efficiency and fairness, frankly, we need to have  
6 an understanding of what claims we're litigating and the  
7 ability to actually do that within the time period that's being  
8 proposed.

9 THE COURT: And do you agree that the provisions of  
10 appendix C governing streamlined discovery, that is to say  
11 limitations on deposition time, the nature of the request for  
12 email, and other, that they apply here?

13 MS. SHERMAN: In general, yes, your Honor.

14 There may be instances, you know, if they come out  
15 with seven experts, it may be that we need to expand the  
16 discovery to ensure that we can depose all of their experts.  
17 But I think our intention is to comply with the spirit of this  
18 provision but do it in a way that ensures that our clients get  
19 the discovery they need in order to prepare this case for  
20 trial.

21 THE COURT: All right. Ms. Whang, let me turn back to  
22 you and ask you two direct questions, which is, one, if you  
23 amend, will J&J be a named defendant in the amended complaint?

24 MS. WHANG: Yes. J&J will continue to be a named  
25 defendant in the amended case. The parties are not changing

O5LJCHEC

1     whatsoever. And even if you contemplate the motion to dismiss  
2     that seeks to strike one of the claims or two of the claims  
3     against J&J, J&J is still participating in discovery in this  
4     case as a fundamental participant in this contract, as somebody  
5     who appointed members to the JSC, which is a critical  
6     decision-making body in the context of this dispute. J&J will  
7     absolutely continue to be a part of this discovery, whether or  
8     not they are a defendant in this case. That does not change  
9     the scope of who will be producing relevant information here.

10           THE COURT: And second, am I correct in inferring from  
11     what you said earlier that any amended complaint would also  
12     include the request for consequential damages beyond the  
13     \$40 million termination fee?

14           MS. WHANG: No, your Honor, that's not correct.

15           The amended complaint is simply going to make sure  
16     that on the existing contract claim, that we are seeking the  
17     failure to pay the \$40 million termination fee. The existing  
18     complaint seeks direct damages of the failure to pay regulatory  
19     and developmental milestones and lost profits and royalties --  
20     or excuse me, lost royalty payments, which the contract very  
21     uniquely coins direct damages in this matter.

22           THE COURT: So I'm confused. The amended complaint  
23     would seek only the \$40 million termination fee in connection  
24     with the breach of contract or also I think it was \$1.2 billion  
25     that you're seeking in the complaint.

O5LJCHEC

1 MS. WHANG: In the current complaint, that's correct.  
2 The amended complaint, in somewhat of a unique fashion in  
3 response to the motion to dismiss arguments, will make more  
4 clear that ChemImage is also seeking the \$40 million with  
5 respect to the failure to pay the termination clause because of  
6 the unique arguments that defendants have advanced in their  
7 motion to dismiss along the lines of, well, you know, we didn't  
8 really terminate under the for-cause provision. We could have  
9 terminated without cause, therefore, the \$40 million  
10 termination fee that's attended to the without-cause provision  
11 should be a cap on damages.

12 It's in response to that unique argument advanced in  
13 defendant's motion to dismiss. Does not change the scope of  
14 the claims at all. So it would seek both the \$1 million  
15 royalty damages in addition to the \$40 million termination fee  
16 so as not to run into any argument down the line that plaintiff  
17 has waived that. That's the nature of the proposed amendment.

18 And I apologize. I did not mean to suggest that we're  
19 not trying to give the Court a clear answer on whether we're  
20 going to amend. We saw the notice from the Court giving us  
21 leave to do so, and it's with the client and they're deciding.  
22 So I didn't want to commit one way or the other without being  
23 able to get that confirmation.

24 THE COURT: Understood.

25 And anything else you want to say in response to what

O5LJCHEC

1 Ms. Sherman said?

2 MS. WHANG: Just briefly I'm a little concerned about  
3 Ms. Sherman's response to your Honor's question: Do you intend  
4 to abide by the rest of the streamlined discovery provisions in  
5 the contract? I'm a little concerned about the response that  
6 yes, we intend to abide by the spirit of the contract. The  
7 contract is very clear, which is why we're here asking for a  
8 case management order to be entered consistent with the  
9 eight-month trial-ready provision.

10 The suggestion that there should be leeway with  
11 respect to the also very specifically negotiated and, like your  
12 Honor said, unique provisions streamlining discovery which  
13 would make that eight-month trial-ready provision doable is  
14 something that plaintiffs would seek to enforce as well.

15 THE COURT: All right. So let me answer one question,  
16 which is I am going to enter a case management plan today.  
17 Under other circumstances I might well wait until a rule on the  
18 motion to dismiss. But, number one, it's only a partial motion  
19 to dismiss. Number two, the law is clear that there's  
20 certainly no entitlement to a, stay, if you will, or not  
21 proceeding with discovery pending a motion, and it's within my  
22 discretion.

23 Given that it's partial and given the parties'  
24 agreement, which defendants appear to concede at least in some  
25 respects applies, I think it makes sense to plow ahead and

O5LJCHEC

1 begin and proceed with discovery, notwithstanding the pending  
2 motion. I'll certainly try to resolve any new motion, if  
3 there's an amended complaint, in relatively quick fashion, and  
4 thereby ensure that you understand or have a sense of the scope  
5 of the case sooner rather than later.

6 But whatever the case may be, I think plaintiff is  
7 entitled to proceed with discovery in the meantime. So I will  
8 be entering a case management plan today, and it will be full  
9 speed ahead on that front. I'm happy to speak about the  
10 proposed deadlines or I guess hear from Ms. Sherman, since  
11 defendants' proposed deadlines were pegged to my decision on  
12 the motion to dismiss, and I'm not going to take that approach.

13 So I guess the question I have for you is I know,  
14 given the language of the parties' agreement – and I think  
15 Ms. Whang does provide at least a plausible way to reconcile  
16 the two paragraphs that I flagged – that is to say discovery  
17 within nine months, why shouldn't I set the deadlines that  
18 plaintiff is proposing, at least in the first instance, and try  
19 to keep this on track consistent with the parties' agreement?  
20 Ms. Sherman?

21 MS. SHERMAN: Your Honor, we're certainly willing to  
22 move forward with discovery. I guess we would suggest that a  
23 slightly longer period than that proposed by the plaintiff. I  
24 think if we could have until roughly the end of September for  
25 fact discovery, at least a month for opening expert reports, a

05LJCHEC

1 month for rebuttal, a month to conduct depositions with summary  
2 judgment to be filed a month after that, I think that's still  
3 about eight months from today, which is generally moving on a  
4 pretty quick track.

5 But I think what they have proposed is too  
6 circumscribe because, one, it doesn't provide for ample time  
7 for the service of expert reports and completion of expert  
8 discovery; and, two, they want to have summary judgment fully  
9 briefed, I think, within two weeks after the close of expert  
10 discovery, which just isn't feasible when any summary judgment  
11 necessarily is going to rely on experts to some degree. So I  
12 think we need a little bit more spacing than what they've  
13 proposed, but we're certainly willing to move forward.

14 THE COURT: All right. Let me pause to say one thing  
15 about summary judgment, which is, as you probably saw in my  
16 proposed case management plan and individual rules and  
17 practices, my sort of heavy presumption in a bench trial case –  
18 this is a bench trial case – is not to have summary judgment  
19 motion practice, but, rather, to proceed directly to trial.

20 The reason being twofold, one, is the way I handle  
21 bench trials is with direct testimony by affidavit for most  
22 witnesses, so the filings in that regard are similar to those  
23 that would be filed in connection with summary judgment.  
24 Number two, is it's just in my experience a faster way to get a  
25 case across the finish line because I can make findings and

O5LJCHEC

1 then give you rulings rather than deciding on the basis of  
2 summary judgment motion papers that there's a dispute of fact  
3 that requires trial and then essentially repeating the  
4 exercise.

5 I think there's a third reason to stick with that  
6 approach here, which is it's a lot easier to comply with the  
7 language of the parties' agreement because there wouldn't be  
8 summary judgment, and it would be trial ready because we would  
9 go to trial at the conclusion of discovery. So unless one or  
10 both sides make a pretty strong argument or case for why I  
11 should deviate from that practice and entertain a summary  
12 judgment motion, I will tell you now that in all likelihood  
13 we'll proceed directly to bench trial at the conclusion of  
14 discovery. So that's number one.

15 Number two, I guess I hear you. But it strikes me --  
16 well, I guess let me ask a question before I give you further  
17 thoughts. Is this clearly a case where expert discovery has to  
18 await the conclusion of fact discovery? Or is it possible to  
19 proceed in tandem, at least with respect to some of the  
20 experts? I don't know what kind of expert discovery we're  
21 talking about.

22 MS. SHERMAN: Well, I think to the extent that we can  
23 get experts started, we will certainly do so. But a large  
24 degree of the data that our experts will need in order to  
25 analyze the technology that ChemImage has is in ChemImage's

O5LJCHEC

1 possession. So we have not gotten the underlying data that  
2 supports the report that they presented to Ethicon to say that  
3 their technology had met the milestone. So at a minimum, we  
4 are going to need some document production before our experts  
5 can get started.

6 On the damages front, obviously that will depend to a  
7 degree on what your Honor does with respect to the motion and  
8 what types of damages they purport to put forth. But I think  
9 as to the technical specifications and the technical analysis  
10 of whether their technology has passed the milestone, we do  
11 need discovery from them.

12 THE COURT: Okay. And can you tell me what expert  
13 discovery you envision, damages, and whether they met the  
14 milestone or is that --

15 MS. SHERMAN: At a minimum, we intend to have one or  
16 more experts to analyze the data that they presented and offer  
17 an opinion as to whether or not their technology worked and  
18 whether or not it met the specifications that the parties  
19 agreed to for purposes of determining feasibility.

20 THE COURT: Okay. Ms. Whang?

21 MS. WHANG: So I want to start with the case  
22 management order and then move on to experts.

23 So on the case management order, I'd like to start  
24 with where I think we have agreement. I heard Ms. Sherman say  
25 that with respect to fact discovery, end of September made

O5LJCHEC

1 sense here. We've proposed September 19, which is in  
2 accordance with your Honor's rule. That's about 120 days from  
3 the initial pretrial conference. In fact, I think you might  
4 have to move that up a day if you calculated it based on  
5 today's new conference date. But it seems like we're aligned  
6 on September 19 or 18 as working for end of fact discovery.

7 Moving to the close of expert discovery, plaintiffs  
8 proposed in their proposed case management plan November 25.  
9 Notably, that's about 67 days from the close of fact discovery.  
10 Your Honor's form case management plan asks that fact discovery  
11 be done in 45 days, absent exceptional circumstances. So ours  
12 accommodates what I think defendants' argument is with respect  
13 to highly technical data, but it also adheres more closely to  
14 your Honor's form rules.

15 That said, this is not a hyper-technical case, as  
16 defendants have argued, in a way that should change the case  
17 management plan. Here I think we're talking about two experts,  
18 three at most, somebody on the damages front and then somebody  
19 to discuss why the milestone was met or why the data that went  
20 into the analysis showing why the milestone was met was sound.

21 And the other piece of the case management order that  
22 doesn't touch discovery is the length of trial. That's where  
23 the parties submitted differing proposals. Plaintiff's  
24 proposal was five trial days; defendants' was ten. Here, just  
25 speaking from a practical perspective, plaintiffs having the

O5LJCHEC

1 burden of proof, we're estimating five days. This is, like  
2 your Honor mentioned, a nonjury trial where the scope of  
3 discovery has been cabined quite significantly to 40 hours of  
4 deposition testimony per side, something that we endeavor and  
5 think we will be able to do in no longer than five trial days.

6 And something that is not in the form case management  
7 plan but that we would like, if possible, for the Court to  
8 include is memorializing a date with respect to being trial  
9 ready. The agreement that we talked about at length this  
10 morning has the eight-month trial-ready provision. We talked  
11 about how summary judgment, absent extraordinary circumstances,  
12 won't be an issue here. So if we can go ahead and memorialize  
13 that or set a final pretrial conference consistent with that  
14 agreement, I think that would go a long way to helping keep the  
15 parties on track to meet the eight-month trial-ready provision  
16 that's in the agreement.

17 THE COURT: Okay. I think there's a question in my  
18 mind as to what trial ready means. One could imagine that  
19 everything done except your trial submissions, given that we're  
20 proceeding as a bench trial, qualifies as trial ready. Or one  
21 could imagine everything except literally appearing in court  
22 for trial. I think I'm not going to dot that today.

23 Ms. Whang, do you want to address expert discovery on  
24 what you anticipate on that score? Or are we essentially  
25 talking a damages expert, assuming that the motion isn't

O5LJCHEC

1 granted on that front, and experts on whether the technology  
2 met the requirements, etc.?

3 MS. WHANG: Exactly. So I was referring to  
4 plaintiff's expert case when I said two experts, potentially  
5 three. So exactly as your Honor just mentioned, a damages  
6 expert, and somebody to analyze whether the milestone was met  
7 and/or to opine on the data practices that went into showing  
8 that the milestone was met, so a fairly conscribed expert case  
9 as well.

10 Notably, the 40-hour cap on depositions is inclusive  
11 of fact and expert discovery. So I'm not sure this is the kind  
12 of case where - I heard Ms. Sherman say something like seven  
13 expert reports - I'm not sure that that makes sense given the  
14 parties' cap of 40 hours as to deposition testimony. I guess  
15 there would be a world in which somebody could put in an expert  
16 report and forego the opportunity to take a deposition with  
17 respect to that expert, but that would be unusual heading into  
18 trial. So I don't envision that's going to be the case where  
19 we see an abundance of expert reports, given the cap on  
20 depositions.

21 THE COURT: Got you. All right.

22 So I think in the first instance, at least, I am going  
23 to adopt plaintiff's proposed deadlines of September 19 and  
24 November 25. I do so for a couple reasons. One is I would  
25 note that the September 19 date is, as Ms. Whang notes, not far

O5LJCHEC

1 off from what Ms. Sherman agreed was feasible. Number two,  
2 that schedule at least leaves the possibility open of meeting  
3 the eight-month framework that the parties did agree to. And  
4 number three, I think better to be ambitious and aggressive in  
5 the first instance and see where things stand.

6 It strikes me from hearing Ms. Sherman that it seems  
7 like the parties agree that fact discovery, especially with the  
8 parameters that the parties agreed to in appendix C, can be  
9 done by that September date. The bigger question is expert  
10 discovery. Two reasons I'm going to adopt the more aggressive  
11 schedule in the first instance, aside from what I've already  
12 mentioned, one, is that depending on my ruling on the motion,  
13 it may be that there's less expert discovery to be done, as  
14 Ms. Sherman notes.

15 Number two, it certainly sounds to me like it may be  
16 possible to begin expert discovery even before fact discovery  
17 closes. And that's something I'm going to ask you to confer  
18 about sooner rather than later. And especially mindful of the  
19 streamlined nature of discovery that the parties have agreed  
20 to, it may be that the data that Ms. Sherman says is needed for  
21 one or more of the experts to proceed is something that you can  
22 prioritize and get sooner rather than later so that those  
23 experts can actually begin their work sooner and, to the extent  
24 that defendants believe that a longer schedule is needed for  
25 expert discovery with exchange of reports and what have you,

O5LJCHEC

1 you can actually do that even before the close of fact  
2 discovery.

3 So bottom line is you should assume that those dates,  
4 September 19 and November 25, are fixed and firm dates and  
5 aren't going to change. I will do my best to ensure that that  
6 remains the case, and you should proceed accordingly including  
7 the ways that I've just suggested.

8 Let me say a couple things more broadly. First, and  
9 consistent with what I just said, while the interim discovery  
10 deadlines that are set forth or will be set forth in  
11 paragraph 9 of the case management plan are subject to change  
12 by written agreement between you, and you don't need my  
13 permission to change those dates, you do need my permission to  
14 change the two dates that I just set and mentioned,  
15 September 19 and November 25.

16 As I said, do not anticipate that those dates will be  
17 extended, and you should proceed accordingly. If something  
18 arises that you think makes it impossible to meet those  
19 deadlines, you can certainly raise the issue. You better raise  
20 it in advance of the deadline, and you better raise it by  
21 letter motion filed on ECF. And it better make a good case,  
22 especially given appendix C to the parties' agreement, for why  
23 that is necessary and it's not for lack of due diligence on  
24 your part.

25 Bottom line is you know the clock is ticking. You

O5LJCHEC

1 agreed to the agreement, at least Ethicon did, and it's on you  
2 to do what you need to do to get it done within this aggressive  
3 time schedule. And if you don't do what you need to do to get  
4 that done, I'm telling you that you're not likely to get  
5 additional time, so proceed accordingly.

6 If there are discovery disputes along the way, you're  
7 required under paragraph 11 of the case management plan and my  
8 individual rules and practices to confer with one another in an  
9 effort to resolve those disputes. If you do that and any  
10 issues remain in dispute, then either side can file a letter  
11 motion not to exceed three pages. The other side has three  
12 business days in which to respond, and I will resolve the issue  
13 promptly either by bringing you in for a conference or  
14 resolving the issue, including the underlying issue, by order.

15 So bottom line being, number one, try to work things  
16 out. Given the parties' agreement, given the expedited  
17 schedule, that's certainly the best way forward, most efficient  
18 path forward. But in the absence of agreement, there is a  
19 process in place to resolve things for you, and you better  
20 avail yourself of it. If you wait until discovery is about to  
21 be over to raise an issue that you could have and should have  
22 raised sooner, I can assure you that you're not going to get  
23 whatever it is that you think you're entitled to, and you're  
24 not going to get additional time either. So keep both of those  
25 in mind.

O5LJCHEC

1           Given the nature of the case, the issues we've  
2       discussed, I'm going to deviate from my usual practice, which  
3       is to have you in shortly after the close of fact discovery.  
4       And instead, I'll have you in a month or so before the close of  
5       fact discovery to see where things stand and discuss further  
6       the other issues that we've discussed and left open, including  
7       bench trial practices and deadlines and what have you.

8           In particular, I would propose a status conference on  
9       August 14 at 9:00 a.m. If we hold that conference, which I  
10      would anticipate -- actually, you know what? Let's make it  
11      August 14 at 10:00 a.m. Does that date and time work for  
12      everybody, Ms. Whang?

13           MS. WHANG: Yes, your Honor.

14           THE COURT: Ms. Sherman?

15           MS. SHERMAN: Yes, your Honor.

16           THE COURT: Great. Unless and until I say otherwise,  
17      presume that that is a telephone conference. If it makes sense  
18      to convert it to an in-person conference as we did today or as  
19      I did today, I will let you know. But bottom line is you  
20      should plan to appear at that time and plan to discuss whatever  
21      discovery remains, including schedule for expert discovery and  
22      also the logistics, timing of a bench trial.

23           That I think covers everything that I would want to  
24      discuss today. Would normally ask about settlement. Both  
25      parties' letters seem to indicate that there was nothing to be

O5LJCHEC

1 done on that front now, so I'm not sure there's anything so  
2 discuss. I will say that this strikes me as a case where if  
3 you were to engage in alternative dispute resolution that  
4 private mediation might make the most sense here. Even if now  
5 is not the time to do it, given the expedited nature of the  
6 litigation, I would encourage you to talk about that option,  
7 and even if it's just to preliminarily agree on who a  
8 third-party mediator might be and line that person up.

9 I will tell you that I may require you to give it a  
10 shot before you actually go to trial. And given, again, the  
11 expedited nature of this or the extent to which we want to  
12 stick with an expedited schedule, teeing that up sooner rather  
13 than later so you can do it in the event that you're required  
14 to do it or agree it would be advisable would probably make  
15 sense. Happy to discuss that further, but take it that it  
16 might be premature, Ms. Whang?

17 MS. WHANG: Yes, I think it's premature, your Honor.  
18 And I will also mention the parties had engaged in a mediation  
19 prior to the filing of the complaint.

20 THE COURT: Understood. Although I think that was  
21 last year, if I remember correctly.

22 Ms. Sherman, anything to say on that front?

23 MS. SHERMAN: No, your Honor.

24 We're certainly open to mediation. But at this point,  
25 I don't think anything has changed from where we were last

O5LJCHEC

1 year. And so perhaps following additional rulings and  
2 discovery, the parties may be in a different position.

3 THE COURT: All right. And I guess the last thing  
4 I'll say is, assuming plaintiff does file an amended complaint  
5 this week and based on our conversation, I'm guessing there  
6 will be an amended complaint, I think my prior order had set a  
7 deadline for any new motion to dismiss. I would encourage you,  
8 Ms. Sherman, to talk to one another and perhaps agree on a more  
9 expedited briefing schedule for that. I can't guarantee I will  
10 expedite a ruling, but I will do my best.

11 Bottom line is if you think the decision on that  
12 motion has significant bearing on discovery, which sounds like  
13 defendants do think, and even if plaintiff doesn't, then it  
14 might be in your interest to speed that along. And so if you  
15 can shave a couple weeks off the briefing schedule, that might  
16 facilitate getting you a ruling sooner rather than later. So  
17 unless and until I say otherwise, the deadline is what it  
18 currently is. But if you think that in light of what I just  
19 said it might make sense to expedite that process, I would  
20 encourage you to talk to one another and submit a letter motion  
21 to me proposing a modification to the schedule.

22 All right. Anything else from either side, Ms. Whang?

23 MS. WHANG: No, your Honor. Thank you.

24 THE COURT: Ms. Sherman?

25 MS. SHERMAN: No, your Honor. Thank you.

O5LJCHEC

1 THE COURT: All right. Thank you for coming in. And  
2 with that, we are adjourned.

3 I'll docket the case management plan later today.  
4 Thank you very much.

5 (Adjourned)